

MINUTES
MARCH 23, 2006

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:15 a.m., on Thursday, March 23, 2006, in Room 317 of the Capitol Building, 1301 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Heidi Kaiser, Don Marble, Bill Rossbach, Robin Shropshire, Gayle Skunkcap & Kim Lacey

Board Attorney Present: Katherine Orr, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Tom Livers, Deputy Director; Tom Ellerhoff, Director's Office (DIR); Lisa Peterson, DIR; John North, Chief Legal Counsel, DIR; Jim Madden, Legal, DIR; Claudia Massman, Legal, DIR; Jane Amdahl, Legal, DIR; David Rusoff, Legal, DIR; Steve Welch, Permitting & Compliance Division (PCD); Bonnie Lovelace, Water Protection Bureau (WPB), PCD; Tom Reid, WPB, PCD; Don Vidrine, Air Resources Management Bureau (ARMB), PCD; Debbie Skibicki, ARMB, PCD; Vickie Walsh, ARMB, PCD; David Klemp, ARMB, PCD; Charles Homer, ARMB, PCD; Eric Merchant, ARMB, PCD; Jan Brown, ARMB, PCD; Ed Thamke, Waste & Underground Tank Management Bureau, PCD; John Arrigo, Enforcement Division; Art Compton, Planning, Prevention & Assistance Division (PPAD); George Mathieus, Water Quality Planning Bureau (WQPB), PPAD; Bob Bukantis, WQPB, PPAD; Christian Levine, WQPB, PPAD; Brian Spangler, Air, Energy & Pollution Prevention Bureau (AEPPB), PPAD; Jeff Blend, AEPPB, PPAD

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Jack Tuholske, Northern Plains Resource Council (NPRC); Jay Skabo, Montana Dakota Utilities (MDU); Brian Johnston; Archie McMillan; Daniel Lynn; Clare Witcomb, NPRC; Charles Robin; David Searle, Marathon Oil; Ray Muggli, NPRC; Joe Kolman, Environmental Quality Council (EQC); Jim Sweaney, NPRC; Julia Page, NPRC; Heidi Anderson, NPRC; Keith Bales; Jeff Barber, Montana Environmental Information Center (MEIC); Eleanor Parker, NPRC; Richard Ports, NPRC; Jim Munz, NPRC; Patricia Helvey, NPRC; Kendal Van Dyke, NPRC; Joseph Walks Along, Jr., Northern Cheyenne Tribe (NCT); Bill Connors, Centennial Power; Jay Littlewolf, NCT; Sara Toubman, NPRC; Barbara Burkland, Environmental Protection Agency (EPA); Don Skaar, MFWD; Joe Fox, Jr., NCT; Myshell Lyday, NWF; Colleen Simpson, NPRC; Bud Clinch, Montana Coal Council; Gayle Joslin, NPRC; Olaf Stimae, Plumbers & Fitters L.U.42; Debra Beaver,

NPRC; Jim Parker, PPL Montana; Chere Jiusto, Montana Petroleum Association (MPA); Jim Jenks, MPA; Harold and Jan Hoen; Rich Southwick, GNP/GNPD; William Eggers; Greg Lind; Tracie Small, Crow and NCT; Abigail Dillen, Earthjustice; Mair Eggers; Jeanne Charts, Bull Mountain Land Alliance; Dave Kelsey, Southern Montana Electric G&T (SME); Terry Holzer, SME; WM Fitzgerald, SME; mark Fix, NPRC; Teresa Erickson, NPRC; Clint Mcrae, NPRC; D. Getz, NPRC; Beth Kaeding, NPRC; Roger Muggli, Tongue & Yellowstone Irrigation District; Art Hayes, Jr., Tongue River Water Users Association; Willie Duffield, MAOGC; R.J. DeGroot; Bill Courtney, Powder River Gas and EMIT Technology; Alvin Hoff, NPRC; Craig Herbert, Montana Dakota Utilities (MDU); Tom Schneider; Anne Hedges, MEIC; Dave Bockelmann, ALL Consulting; Kate joint, NPRC; Janet McMillan, NPRC; Frank Kuehn, NPRC; Nellie Israel, NPRC; Dave Galt, MPA; Bruce Williams, Fidelity E&P; Don Allen, Western Environmental Trade Association; Harmon Ranney, Quantum Energy; Tim Gregori, SME; Mike S., SME; Joe Dirkson, SME; Lawrence McEvoy; Joe Lierow, Bison Engineering; Candace Payne, SME; Christine Phillips, Sierra Club; Janet Ellis, Montana Audubon; Tom Ebzery, Nance Petroleum and Marathon Oil; Randi Stoddard; Don Quander, large customer group; A. See, SME; Gary Wiens, Montana Electric Cooperatives Association; Lori Arvidson, MontPERG

- I.A. Review and approve minutes of February 3, 2006, regularly scheduled Board meeting.
- Chairman Russell called for a motion to approve the February 3, 2006 meeting minutes. Mr. Skunkcap so MOVED. Mr. Marble SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- I.B. Review and approve November 9 & 10, 2005, hearings summary pertaining to coalbed methane rules.
- Chairman Russell called for a motion to approve the November 9 & 10, 2005, hearings summary. Mr. Marble so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- I.C. Review and approve December 1, 2005, hearing summary pertaining to coalbed methane rules.
- Ms. Kaiser noted that she was not listed as being present, though she was.
- Chairman Russell called for a motion to approve the hearing summary, as amended. Ms. Shropshire so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- II.A.1.a In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act, BER 2002-09 MM.
- Ms. Orr had no further information beyond that provided in the agenda.
- II.A.1.b In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleums, Inc., BER 2003-14 HW.
- Ms. Orr said there would be oral argument on a partial motion for summary judgment on April 7.
- II.A.1.c In the matter of violations of the Montana Water Quality Act by the City of Lewistown Wastewater Treatment Plant, BER 2004-15 WQ.
- Ms. Orr said the parties had requested an additional 60 days to submit a settlement document and that she would be issuing an order to approve the request.
- II.A.1.d In the matter of violations of the Water Quality Act by ASARCO, Inc., BER 2005-09 WQ.
- Ms. Orr had no further information beyond that provided in the agenda.
- II.A.1.e In the matter of the issuance of the Air Quality Permit for the Roundup Power Project, Permit No. 3182-00, BER 2003-04 AQ.

- Ms. Orr had no further information beyond that provided in the agenda.
- II.A.1.f In the matter of the request for hearing of Jay Gasvoda, d/b/a Gasvoda Construction, BER 2005-17 OC, regarding the Notice of Violation and Statement of Proposed Penalty.
- Ms. Orr said the Department had filed a motion to compel, but had not received an answer brief.
- II.A.1.g In the matter of the appeal by Westmoreland Resources Inc., BER 2005-19 SM, regarding the issuance of a Notice of Violation and Statement of Proposed Penalty.
- Ms. Orr said the parties had submitted a settlement document and a stipulation for dismissal, but it was not in time for this meeting. She said she would be asking the Board to approve it at the next meeting.
- II.A.1.h In the matter of the Montana Environmental Information Center's appeal of Air Quality Permit No. 3182-01, issued for the Roundup Power Project, BER 2005-21 AQ.
- Ms. Orr said a motion to dismiss had been filed and oral argument would be heard April 7.
- II.A.1.i In the matter of the request for hearing by Oro Management, LLC, regarding alleged violations and an assessed penalty, BER 2006-01 MM.
- Ms. Orr said the parties would be tendering a settlement document by March 30.
- II.A.1.j In the matter of the request for hearing by Bear Cub, LLC, regarding Sunrise Lots subdivision waiver denial, BER 2006-02 SUB.
- Ms. Orr had no further information beyond that provided in the agenda.
- III.A.1 In the matter of final action regarding New Rule I, State Solid Waste Management Resource Recovery Plan.
- Mr. Spangler said this was an update of the Solid Waste Management Plan and that a public hearing was held November 18, 2005. He said the plan had not been updated since its adoption in 1994.
- Discussion took place regarding e-waste.
- Chairman Russell called for public comment on the proposed plan. No one responded.
- Chairman Russell called for a motion to adopt the presiding officer's report, the DEQ's 521 and 311 analyses, and the responses to comments, as well as the amended

Solid Waste Management Plan. Mr. Rossbach so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.A.2 In the matter of final action regarding Enforcement Rules at ARM Title 17, Chapter 24, 30, 38, and 56.

Mr. Arrigo explained that a public hearing and comment period had been held, that many comments had been received, and that the Department was proposing some modifications to the original notice. He described the proposed changes. He requested that the Board the rules as modified.

Chairman Russell called for public comment on the proposed rules.

Mr. Barber said that MEIC did not feel that the Department had addressed the big issues that it had brought up in comments on the rulemaking regarding discretion and predictability. He provided copies of 75-5-631 and 82-4-254. He said the Board did not need to act on this rule now, but has until June 22 to take final action. He asked that the Board direct the DEQ to meet with interested parties and work on language that will be predictable, concrete and meaningful enforcement. He responded to questions from Ms. Kaiser.

Mr. Arrigo responded to the comments of Mr. Barber and responded to questions from the Board. Further discussion took place.

Mr. Quander said the Department had made a good faith effort to develop consistent rules for doing enforcement. He said that his clients also have concerns about discretion, but that they expect the Department will exercise it in good faith – that's been their experience.

Mr. Allen said WETA would urge the Board to go ahead and adopt these rules.

Mr. Clinch said the Montana Coal Council has some reservations in regard to the discretion, but supports moving forward with the rules now. He responded to questions from Mr. Rossbach.

Mr. Arrigo responded to questions from the Board.

Mr. Marble MOVED to TABLE the matter until the next meeting. Discussion commenced regarding the motion and regarding the best course of action at this time.

Mr. Arrigo presented alternatives. He provided fixed numbers for the cells in the matrix.

Chairman Russell called for a motion to accept the numbers just provided. Mr. Rossbach so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Further discussion took place.

Mr. Rossbach MOVED to adopt the rule as amended this day, the 521 and 311 analyses, and the Presiding Officer's report, and to allow the Department to revise the responses to comments to fit the decisions made for approval at the discretion of the Chair. Ms. Lacey SECONDED the motion. The motion CARRIED on a 5-1 VOTE.

III.A.3 In the matter of final action regarding Coalbed Methane Rules, ARM 17.30.670.

Mr. Livers said there had been extensive public comment, including hearings in Lame Deer, Miles City and Helena, and an extensive public comment period. He said comments continued being sent after the close of the comment period and that those comments were in a folder in front of them. Mr. Livers said a letter from the EQC stating they did not believe the Board had the authority for the reinjection component of the rule was also included, as well as the 521 and 311 analyses.

Mr. Livers said the rule would be addressed today as five separate components: 1) nondegradation; 2) reinjection; 3) effluent limits; 4) permitting methodology, or flow-based 7Q10; and 5) severability.

Mr. Quander asked whether the Board believed the proposed rule could potentially have a significant impact on human health or the environment and that if they did not, then the rulemaking should not be pursued. He said if the Board believed it could have a significant impact on human health or the environment, the Board must comply with the Montana Environmental Policy Act prior to taking action. He believed an EIS was warranted.

Mr. North said this issue was raised by many commenters and is addressed as Comment No. 70. He said if the Board were to adopt the nondegradation requirement, Comment No. 70 and its response should be amended. He also said that the Department believed that compliance with MEPA is not a requirement at this point.

Mr. Compton said the first component would be ARM 17.30.670, the nondegradation provisions, and that amendment of this section would designate EC and SAR harmful parameters. He said the evidence in this rulemaking supports it and that the Department recommends the Board adopt the nondegradation provisions. He responded to questions from Ms. Kaiser and discussion took place regarding the EIS.

Mr. Fix spoke in favor of nondegradation.

Mr. Searle, Mr. Williams, and Mr. Cebull spoke in opposition of nondegradation.

Discussion took place regarding the 2003 rulemaking, the designation as harmful parameters, permitting, and tribal involvement.

Mr. Rossbach MOVED to adopt the proposed nondegradation standard as

submitted. Ms. Shropshire SECONDED the motion.

Mr. Walks Along, Jr. said the Tribe supports DEQ's recommendation.

Chairman Russell called for a VOTE. Mr. Skunk Cap abstained. The motion CARRIED 4-2.

Chairman Russell referenced a memo from the EQC regarding the Board's lack of authority to adopt reinjection. He called for a motion to reject the reinjection proposal based on the EQC memo.

Mr. Rossbach MOVED to reject the reinjection proposal not based on the EQC memo, but on the evidence and testimony. Ms. Lacey SECONDED the motion. The motion CARRIED with unanimous VOTE.

Mr. Compton said the next provision deals with the requirement to treat CBM produced water, before discharge, to the list of technology-based effluent limits in the proposed rule. He said the Department recommends the Board not adopt the proposed effluent limits, because there was insufficient information to establish the technical or economical feasibility of them.

Mr. Reisner referenced a revised treatment rule NPRC had submitted, and provided details of their proposed revisions. He talked about the nondegradation rule and some revised effluent limits that had been included in the proposed revisions. He said the Petitioners requested that the Board adopt their revised rules. Mr. Reisner responded to questions from Board members.

Mr. Williams commented that the newly proposed rules were submitted outside the public comment period and had not been publicly noticed nor made available to the public for review. He said Fidelity agrees with the Department's recommendation that the Board not adopt effluent limits.

Senator Bales spoke in opposition of mandatory treatment and asked that the Board not adopt effluent limits.

Mr. Rossbach MOVED to reject the effluent limits proposed and to direct the Department to bring a proposed rulemaking requiring technology-based effluent limits for initiation at the September Board meeting. Ms. Shropshire SECONDED the motion. Further discussion took place. The motion CARRIED with a unanimous VOTE.

Mr. Compton said the next provision is Section 7 of ARM 17.30.670, which contains the requirement for use of flow based dilution methodology when calculating MPDES discharge permits. He said the proposed rule deletes this requirement and adds a new requirement to use the 7Q10 flow. He said the Department recommends the Board adopt the rule to delete the flow base requirement, but that it not adopt the 7Q10 flow requirement. He said this would preserve the Department's discretion to use either or a combination of both flow base and 7Q10.

Mr. Muggli said the Petitioners agree that the Board needs to eliminate the mandate that the Department use a flow based approach, but requested that the Board adopt the 7Q10 proposal.

Mr. Williams spoke in favor of the Department's recommendations.

Chairman Russell called for a motion to strike Section 7 of ARM 17.30.670. Ms. Lacey so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Compton said the final provision is the nonseverability clause in Section 8 of ARM 17.30.670. He said that since the Board eliminated the narrative nondegradation criteria, which was the justification for the nonseverability clause, the clause is no longer needed.

Mr. Compton said the Department is recommending the Board delete the nonseverability clause.

Mr. Tuholske said his clients concur with the Department's recommendation.

Chairman Russell called for a motion to strike Section 8 of ARM 17.30.670. Ms. Shropshire so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Livers explained some changes that needed to be made in the responses to comments. Further discussion took place.

Chairman Russell called for a motion to adopt the revised responses to comments and the 521 and 311 analyses. Mr. Rossbach so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.A.4 In the matter of final action regarding the amendment of ARM 17.8.504, 505 and 744 and the adoption of New Rules I through IX to establish a registration system for certain facilities.

Ms. Walsh said the Board had initiated the rule in December and that a hearing had been held. She discussed changes that had been made to the rule based on public comment that was received.

Chairman Russell called for public comment regarding the proposed rule. There was no response.

Chairman Russell called for a motion to adopt the rule as amended, the 521 and 311 analyses, and the Presiding Officer's report. Ms. Lacey so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.1 | In the matter of the request to initiate rulemaking to amend ARM 17.8.740 and 17.8.767 and adopt New Rules I and II pertaining to control of mercury emissions.

Mr. Homer explained that the Board would be considering a rule that would establish mercury standards for coal-fired power plants. He talked about the Clean Air Mercury Rule (CAMR) that was adopted by the EPA in May 2005, and also about the cap and trade rule. He discussed previous events that led to the Department proposing its rule.

Ms. Skibicki explained in detail the rule the Department is proposing, and responded to Board member questions. She said Montana is required to submit a mercury control program to EPA by November 16, 2006.

Chairman Russell called for a motion for the Board to hear the rulemaking directly. Mr. Rossbach so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with unanimous VOTE.

Chairman Russell called for public comment regarding initiation of the rulemaking.

Mr. Eggars requested that the petitions be included and incorporated into the rulemaking.

Mr. Fox, Jr. spoke in favor of a mercury rule, but said the Northern Cheyenne has concerns with the proposed rule.

Mr. Lind asked that the Board proceed with the rulemaking.

Ms. Small questioned whether there would be a hearing in May and whether there would be only one hearing.

Dr. McEvoy talked about the history of mercury and spoke in favor of the rulemaking.

Mr. Fender thanked the Board for taking action to move forward with rulemaking for mercury.

Ms. Kaeding said NPRC supports the rulemaking.

Ms. Eggars said there is new research from EPA that was not considered when CAMR was written. She asked that the Board look at that research as they consider this rulemaking.

Mr. Gregori spoke in favor of the rulemaking and said SME will actively participate in the process.

Mr. Wiens asked that the Board keep its options open as it moves forward with the rulemaking.

Mr. Lambrecht spoke in favor of adopting CAMR, but against the rule proposed by the Department.

Ms. Dillon requested the Board keep an open mind as it proceeds with the rulemaking.

Mr. Quander took exception to the Board's comment that it needs to act. He requested that the Board direct the Department to prepare an EIS if the Board intends to move forward with the rule.

Mr. Herbert asked that if the Board moves beyond CAMR, it consider the 2.4 factor for lignite.

Ms. Arvidson submitted 430 postcards in favor of a strong mercury rule.

Mr. Southwick spoke against the proposed rule, saying there would likely be no allowance for new development after 2018. He also requested that the Board conduct hearings in Eastern Montana.

Mr. Hoen spoke in favor of the rulemaking.

Mr. Clinch said the Montana Coal Council opposes any mercury rule that is stricter than the federal rule. He suggested the Board hold two hearings, one in Colstrip and one in Circle.

Mr. Kelsey asked the Board to keep an open mind and to keep in mind that the rule needs to be both technologically and economically feasible.

Chairman Russell explained that the Department would need to work on the logistics of hearing dates and locations. He called for a motion to initiate the rulemaking. Mr. Rossbach so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.2 In the matter of the request to initiate rulemaking to update the Air Quality Incorporation by Reference Rules at ARM 17.8.102 (annual update).

Mr. Homer explained that this proposed rulemaking was an annual incorporation by reference to adopt current versions of rules. He requested the Board initiate the rulemaking.

Chairman Russell called for public comment on the rulemaking request. There was no response.

Chairman Russell called for a motion to initiate the rulemaking. Ms. Kaiser so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.C. In the matter of a public hearing regarding the consideration of proposed revisions to the Lincoln County Air Pollution Control Program.
- Chairman Russell provided a brief summary of the issue.
- Mr. Anderson testified in favor of the proposed revisions and provided background information about the program.
- Ms. Wolfe said the Department has reviewed the proposed revisions and found them to be equivalent or more stringent than comparable state rules, and that they meet the requirements of local program. She said the Department supports the revisions.
- Chairman Russell called for public comment regarding the program revision. There was no response.
- Chairman Russell called for a motion to authorize him to sign the order accepting the revisions. Ms. Shropshire so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.D.1 In the matter of final action regarding the appeal by the Town of Ennis, MPDES Permit No. MT0030732, BER 2005-18 WQ.
- Ms. Orr said the parties were able to reach an agreement about the permit conditions and that an order of dismissal was included for approval by the Board.
- Chairman Russell called for a motion to authorize him to sign the order dismissing the case. Mr. Rossbach so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.D.2 In the matter of final action regarding the request for hearing of Gallatin County concerning fees for Wastewater Permit No. MTR101290, BER 2002-20 WQ.
- Ms. Orr said the County had withdrawn its appeal and that an order of dismissal was included for the Board's approval.
- Chairman Russell called for a motion to authorize him to sign the order to dismiss the case. Mr. Marble so MOVED. Mr. Skunkcap SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.E.1 In the matter of the request for hearing of Blue Bear Minor Subdivision, BER 2006-03 SUB.
- III.E.2 In the matter of the request for hearing of Michael and Kimberly Thomas concerning DEQ's approval of the Blahnik Construction, Inc.'s JCSL North Gravel Pit, BER 2006-04 OC.

Chairman Russell called for a motion to appoint Ms. Orr as permanent hearing examiner for these cases. Ms. Kaiser so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

IV. General Public Comment

Chairman Russell called for general public comment.

Mr. Rusoff explained that Paragraph 9 in the Lincoln County order needed to be deleted.

Chairman Russell called for a motion to strike paragraph No. 9 in the order. Mr. Rossbach so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

V. Adjournment

Chairman Russell called for a motion to adjourn. Ms. Shropshire so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

The meeting adjourned at 4:52 p.m.

Board of Environmental Review March 23, 2006, minutes approved:

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

DATE